IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.11.2007

CORAM:

THE HON'BLE MR. JUSTICE D. MURUGESAN
AND
THE HON'BLE MR. JUSTICE V. PERIYA KARUPPIAH

Crl.A.No.365 of 2006

Ganga @ Gangathar ...Appellant/Accused

vs.

State By:-
Inspector of Police,
Denkanikotai Police Station,
Denkanikottai. ...Respondent/Complainant

Appeal filed under Section 374(2) of Cr.P.C. against the judgment and conviction made in S.C.No.164 of 2000 dated 28.8.2001 on the file of the III Additional District Sessions Judge, Dharmapuri District at Krishnagiri.

For Appellant : Mr. P. Venkatasubramanian

For Respondent : Mr. P.. Kumaresan
Addl. Public Prosecutor

J U D G M E N T

(Judgment delivered by V.PERIYA KARUPPIAH,J.)

The sole accused, who was found guilty under Sections 376 and 302 I.P.C. in S.C.No.164 of 2000 on the file of the Additional Sessions Judge, Dharmapuri, is the appellant.

2. The respondent police had filed a final report against the accused/appellant contending that the accused due to prior enmity, with an intention to commit rape upon one Sumitra, went to her land arming with Aruval and committed rape and that in the same incident, he cut her neck with the Aruval with the intention to cause her death as a result of which she died on the spot due to profuse bleeding and shock and sought for appropriate punishment under Sections 376 and 302 I.P.C.

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3. The learned trial Judge upon consideration of the materials placed before him, felt that there is a prima facie case against the accused, resulting framing of two charges, one under Section 376 and another under Section 302 I.P.C. After framing of the charges, when the accused was questioned, he did not plead guilty, denying the prosecution case.

4. In order to prove the charge against the accused, the prosecution examined as many as 15 witnesses and marked Exs.P.1 to P.21 and material objects 1 to 13. On behalf of the accused, he examined himself as D.W.1 and Ex.D.1 was marked. The learned III Additional Sessions Judge, weighing the above materials and scanning the same from its proper perspective, came to the conclusion that both the charges framed against the accused/appellant are proved, beyond all reasonable doubt. Thus concluding, the learned Judge convicted the accused under Sections 376 and 302 I.P.C. and sentenced him to undergo life imprisonment and to pay a fine of Rs.5000/-, in default to undergo six months R.I. for each offence, ordering the sentences to run concurrently.

5. Brief facts of the prosecution case:

(a) The accused and the deceased belong to the same village. The deceased Sumitra aged 12 years is the daughter of P.W.1. Three or four years prior to the date of examination of witnesses, the deceased went to guard their Groundnut reared land from crows at 7.00 a.m. When P.W.2, younger sister of Sumitra, followed by P.W.1 went to the land to provide tea to Sumitra, they saw the accused going with blood stained clothes at a distance of 50 ft. armed with blood stained Aruval and found Sumitra dead with bleeding injuries on her neck. Thereafter, the accused fled away from the scene of crime.

(b) P.W.1 in his evidence would state that six months prior to the date of occurrence, the accused teased the deceased, which was reported to his brother-in law-P.W.3 and the cousin of the accused, who called the accused and beat him and in order to take revenge of the same, the accused had murdered the deceased. P.W.3 also would state that he beat and warned the accused for having teased the deceased Sumitra.

(c) P.W.4 who belongs to the same village, saw the accused following the deceased with Aruval on the date of occurrence at 7.00 a.m. and two hours later, when he returned to village, he saw Sumitra dead, where people also gathered.

(d) P.W.1 reported the incident to P.W.5, the Village Administrative Officer, who recorded his statement and gave complaint to P.W.11, the Head Constable. On receipt of the complaint, P.W.11 recorded the same in the G.D.-Ex.P.18 and informed the same to the Inspector of Police, P.W.14 on the same day through telegram.

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(e) P.W.14 on receipt of the information came to the station and after perusing the statement of P.W.1 and the endorsement made by P.W.5, registered a case in Cr.No.220 of 1996 for the offence under Section 302 I.P.C. on the same day and took up the case for investigation. The first information report is Ex.P.2. He sent the F.I.R. through P.W.12-Police Constable to the Judicial Magistrate, Hosur. Thereafter, at 4.10 p.m. he went to the scene of crime, prepared rough sketch Ex.P.19 and observation mahazar Ex.P.3 in the presence of VAO and another. He had recovered M.Os.2 & 3 blood stained earth and corresponding sample earth from the place of occurrence and M.O.4-a swinging rope used for driving away the birds under the cover of Mahazar Ex.P.4 in the presence of the same witnesses. He also recovered M.Os.11 & 12, blood stained earth and sample earth available 50 ft. away the scene of occurrence and a white towel-M.O.13. He also examined P.Ws.1 to 3 and 5 in the presence of Panchayatdars and held inquest over the body and prepared inquest report Ex.P.20 and sent the body for post mortem through P.W.13 to Thenkanikottai Hospital with requisition Ex.P.6.

(e) On receipt of the requisition, P.W.7, Dr. V.Saroja conducted autopsy on 7.10.1996 at 10.30 a.m., who noticed the following the following injury:

> "An incised wound on the centre of the neck about 10.15 x 2.5 cm x up to cervical vertebra, cutting all the major vessels, nerves, muscles, trachea and oesophagus."

The doctor analysing the effect of the injury opined in Ex.P.7, post mortem certificate that the deceased died of shock and hemorrhage due to the injury to the vital vessels and trachea in the neck.

(f) In continuation of the investigation, on 8.10.1996, P.W.14 also examined P.W.4 and other witnesses and recorded their statements then and there and sent the recovered objects to the Court. On 11.10.1996 at 8.45 a.m., on the voluntary confession made by the accused to P.W.10 who was talking with P.W.6, they brought the accused to P.W.14, who recorded his confession statement, the admissible portion of which is Ex.P.15. He recovered the shirt of the accused-M.O.5 under Mahazar-Ex.P.17 and took the accused to the place where he concealed the weapon-M.O.1 and recovered the same.

(g) Further, P.W.14, requested the Court under Ex.P.8 to send the accused for medical examination. Accepting the same, the learned District Munsif-cum-Judicial Magistrate, submitted the accused for medical examination under Ex.P9. On receipt of the requisition, P.W.8, Dr. Vallinayagam examined the accused and gave certificate Ex.P.10. He also gave requisition Ex.P.11 to send the case properties for examination, which were sent under Ex.P.12 to the Forensic Lab. Ex.P.13 is the Chemical Examination Report and Ex.P.14 is the Serologist's Report given by the Forensic Sciences Department. In order to ascertain the age of the deceased, he examined P.W.6, the Head Master of the School, who gave certificate, Ex.P.5 indicating that the date of birth of the deceased as

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8.5.1986 as per the school records. He submitted the accused, to ascertain his age, before P.W.15, who gave opinion that the age of the accused is more than 18 years. Thus, concluding the investigation and collecting the relevant materials, he filed the final report, which lead to trial.

6. During trial, the learned trial Judge accepting the oral evidence of P.Ws.1 to 4 and the medical evidence given by the doctors coupled with other attending circumstances, came to the conclusion that the accused is aged 18 years at the time of occurrence and that he had committed rape upon the deceased and in order to screen the offence of rape, he had committed murder by using Aruval, thereby causing her death and that the circumstantial evidence relied on by the prosecution clearly points out the guilt of the accused undoubtedly.

7. Heard Mr. P. Venkatasubramanian, the learned counsel for the appellant and the learned Additional Public Prosecutor, Mr. P. Kumaresan.

8. The learned counsel for the accused/appellant would submit in his argument that,

(i) the trial Court had completely deviated from the principles of criminal jurisprudence and the case entirely rests upon circumstantial evidence and the persons who saw the accused immediately and prior to the occurrence viz., P.Ws.1, 2 and 4 respectively are the relatives of the deceased girl and the interested testimony of the said witnesses was totally relied upon by the trial Court and the accused is not connected with the offence.

(ii) the trial Court had come to the conclusion on the alleged confession given by the appellant relating to recovery of the weapon M.O.1 and the reliance of the recovery on the alleged confession of the appellant/accused will not form a chain for the conviction of the accused on the basis of circumstantial evidence.

(iii) the motive for the commission of the offence is not at all sufficient to hold the conviction against the accused.

(iv) the medical evidence regarding the commission of rape would go a long way to show that there were no injuries on the private parts of the deceased girl and therefore, the commission of rape could not be inferred from the circumstances of the case.

(v) even if the appellant/accused is found to have committed rape and murder of the deceased girl, his age was only 16 years five months as per school certificate Ex.D1, which is below 18 years and therefore, the trial conducted by the Sessions Court is vitiated and the authority to conduct the trial is the Juvenile Justice Board under The Juvenile Justice (Care and Protection of Children) Act, 2000.

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(vi) the age of the accused was not ascertained by the investigating officer by getting birth extract or school certificate and on the other hand, the accused was submitted for medical examination and the doctor had opined that he was above the age of 18 years on the date of offence. Whereas the accused has produced before the trial Court, the school certificate in Ex.D1 which would show that the date of birth of the accused was 5.5.1980. The evidence of the doctor who examined the accused for ascertaining the age had categorically admitted in his cross examination that he cannot deny that the accused is below the age of 18 years and therefore, the proof supported by Ex.D1 would prevail over the evidence of the doctor and accordingly, the accused was aged below 18 years on the date of the alleged offence.

(vii) the trial Court ought to have decided that it has no jurisdiction to try the case and the accused is entitled for acquittal on that score alone and in view of the fact that the accused was an "Adolescent offender" as per the Madras Borstal Schools Act, 1925 and therefore, the conviction and punishment imposed against the appellant are not sustainable in law.

On the above lines, elaborating the same with available materials, a vehement submission was made for acquittal of the accused from the charges under Sections 376 & 302 I.P.C.

9. On the other land, the learned Additional Public Prosecutor, Mr. Kumaresan would submit in his argument that the evidence of P.Ws.1 & 2 cannot be neglected merely because they are the father and younger sister of the deceased Sumitra, who happened to witness the accused bending his head and on seeing them fled away with the Aruval in his hand and P.W.2 had immediately gone and witnessed her elder sister Sumitra dead with cut on her neck on the spot, where the accused was standing and the chance witness P.W.4 also had seen the accused holding the Aruval and was following Sumitra when she was going to her land for the purpose of driving away the crows. He would further submit in his reply that the chance witness cannot be termed as an interested witness. Further, the complaint was given immediately to the Village Administrative Officer and the Village Administrative Officer had submitted the same to Thali Police Station and a case was registered at 3.00 p.m. on that day itself and therefore, the evidence of P.Ws.1 & 2 cannot be disbelieved merely because they are the relatives of the deceased Sumitra.

10. As regards the contention of the learned counsel for the appellant regarding the confession and recovery of the weapon and the motive is concerned, the learned Additional Public Prosecutor would further submit that the presence of blood stains in the weapon-M.O.1 and the clothes of the accused and the blood stains in the dresses of the deceased girl viz., M.Os. 5, 6 to 8 and the blood stains in the earth; the extra judicial confession given by the accused to P.W.10 and the

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subsequent confession given by the accused to the police, leading to recovery of M.O.1 Aruval and the shirt worn by the accused would go a long way to show the involvement of the accused in the crime. Therefore, the Addl. Public Prosecutor would submit in his argument that the circumstantial evidence which proved the motive, presence of the accused prior to the occurrence seen by P.W.4 and after the occurrence seen by P.Ws.1 & 2 and recovery of the weapon from the accused would go a long way to show that the circumstantial evidence had formed a complete chain and no link is missing in the said chain.

11. With regard to medical evidence, the learned Addl. Public Prosecutor would submit in his argument that the evidence of the post mortem doctor examined as P.W.7 would categorically show that the vaginal smear taken from the body of the deceased contain the sperm and the same was identified as human sperm and even though the Serologist Report had not disclosed that the semen found in the vaginal smear of the deceased Sumitra and the semen collected from the accused have not tallied, no inconclusive finding is given in Ex.P.14. The circumstantial evidence would show that the accused was the culprit seen at the place of occurrence prior to and after the occurrence and therefore, mere presence of sperm at the vaginal smear of the deceased itself would fasten the accused with the commission of rape against the deceased Sumitra.

12. As regards the age and jurisdiction of the trial Court to try the case, he would submit that the accused was 18 years old on the date of offence as per the evidence of P.W.15 and the certificate given under Ex.P.21 is conclusive and therefore, the accused cannot be acquitted on the basis that he was a Juvenile and the trial Court had competent jurisdiction to try the accused and the conviction and sentence imposed by the trial Court is quite correct and therefore, the conviction and sentence need not be set aside and the appeal may not be allowed.

13. We have carefully considered the evidence and the materials available on record, perused the judgment of the lower Court and also given anxious thought to the arguments advanced on either side.

14. The age of the deceased Sumitra was only 12 years at the time of commission of offence. According to the argument of the learned counsel for the appellant Mr. Venkatasubramanian, P.Ws.1 & 2 are relative witnesses and their evidence cannot be accepted. No doubt, the complainant (P.W.1) is the father and P.W.2 is the sister of the deceased Sumitra. They happened to see the accused at the place of occurrence and immediately after the occurrence and there is no evidence to show that some other witnesses were also present and they were not examined on the side of the prosecution. P.W.2 is a child witness who was aged 13 years on the date of examination and was aged only 7 years on the date of occurrence. She was found to have competent to give evidence by the trial Court and her evidence was recorded. She had spoken clearly about the presence of the accused at the scene of occurrence and she had found her elder sister Sumitra profusely bleeding from her neck and was dead. She

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had also identified the weapon M.O.1 which was taken away by the accused, while he was fleeing. The said evidence of P.W.2, the child witness cannot be disbelieved merely because she is the younger sister of the deceased Sumitra. Her evidence had corroborated the evidence of P.W.1 and the complaint given by P.W.1. This evidence of P.Ws.1 & 2 have been supported by the evidence of P.W.4, who is a chance witness, who had witnessed the accused following the deceased Sumitra on the fateful day at about 7.00 a.m. Therefore, the evidence of P.Ws.1, 2 & 4 cannot be discarded merely because they are the relative witnesses. It is a settled law that when the witnesses are found to be best witnesses to prove certain facts they cannot be disbelieved merely because they are relatives of the deceased.

15. Moreover, the weapon has been recovered from the accused on his confession, leading to recovery, to the police immediately after the extra judicial given to P.W.10. The said recovery would categorically show that he was involved in the offence committed against Sumitra. The chain of events and the motive spoken by P.W.1 and P.W.3 would go a long way to show that the accused had committed the offence as spoken by the witnesses.

16. However, it was argued by the learned counsel for the appellant that there was no evidence of injuries on the private parts of the deceased Sumitra and the sperms found in the vaginal smear have not been tallied with the sperm collected from the accused and therefore, the offence of rape could not have been committed by the accused. There is no doubt that the vaginal smear of the deceased girl Sumitra contain sperms. It is also not compared that the sperm found in the vaginal smear with the sperm collected from the accused, because the sperms collected from the accused could not be classified as the grouping test was inconclusive due to disintegration. The said failure of grouping the sperm or comparing the sperm will not affect the case of the prosecution because the evidence of P.Ws.1 & 2 have not disclosed that some other male person was also present at the scene of crime. The resistance of the deceased girl could not have been possible on seeing the accused with Aruval threatening her to put to death and hence there might not be any violence at the time of commission of rape. Therefore, the over all circumstances, at the scene of occurrence, would show that the accused alone was present and the deceased girl was found raped and dead at the scene of occurrence as seen by P.Ws.1 & 2 and the accused was fleeing from the scene of occurrence. Under the above facts and circumstances of the case, we are of the considered view that the accused had committed rape upon the deceased Sumitra and subsequently on the fear that she would disclose about the same to others, he had cut the neck of the deceased Sumitra and thereby committed murder.

17. Finally, the learned counsel for the appellant advanced his argument on technicality that the accused was a juvenile on the date of the commission of offence and therefore, the trial conducted by the trial Court is vitiated under the provisions of the Justice Juvenile (Care and

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Protection of Children) Act, 2000 and the appellant was also an 'adolescent offender' on the date of the judgment and therefore, the accused ought not to have been convicted and sentenced as per the Madras Borstal Schools Act. He would further argue that the birth certificate obtained from the school authorities in Ex.D1 would prevail over the medical opinion given by the doctor on the examination of the accused and therefore, the appellant is coming under the category of 'Juvenile offender' as per the Juvenile Justice Act, 2000. He had also cited an authority reported in 1989 Supreme Court Cases (Crl.) 486 (Bhoop Ram v. State of U.P.) in support of his case. The relevant passage runs as follows:

> "The first is that the appellant has produced a school certificate which carries the date June 24, 1960 against the column 'date of birth'. There is no material before us to hold that the school certificate does not relate to the appellant or that the entries therein are not correct in their particulars. The Sessions Judge has failed to notice this aspect of the matter and appears to have been carried away by the opinion of the Chief Medical Officer that the appellant appeared to be about 30 years of age as on April 30, 1987. Even in the absence of any material to throw doubts about the entries in the school certificate, the Sessions Judge has brushed it aside merely on the surmise that it is not unusual for parents to understate the age of their children by one or two years at the time of their admission in schools for securing benefits to the children in their future years."

18. On a careful perusal of the judgment of the Apex Court submitted by the learned counsel for the appellant, we could understand that the certificate obtained from the school authorities viz., Ex.D1, when it is not otherwise invalid or found to be defective, it would prevail over the opinion of the medical officer as given in Ex.P.21. Therefore, we could see that the age of the accused on the date of offence would be 16 years five months and it is not above 18 years. The Juvenile Justice Act, 1986 was in force on the date of the offence viz. 7.10.1996. According to the said Act, the Juvenile is defined under Section 2(h) of the Act. Section 2(h) reads as follows:

> "juvenile" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.

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According to the said Section, 'Juvenile' means a boy, who has not attained the age of 16 years. Admittedly, the accused had completed the age of 16 years on the date of offence and therefore, he cannot be termed as 'juvenile' on the date of offence as per the law prevailing in the corresponding period. Therefore, the proceedings taken under the said Act is corresponding to the present Act. Therefore, the accused cannot be considered as a "juvenile" on the date of occurrence and the trial

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conducted by the trial Court is quite legal and it is binding. The learned counsel for the appellant would further submit in his argument that the appellant is an "adolescent offender" on the date of judgment i.e. on 28.8.2001 and therefore, the conviction against the accused could be sustained, but the sentence of life imprisonment ought to have been quashed. He had relied upon a judgment rendered by our High Court reported in 2000 (1) LW Crl. 142 (Ramasamy v. State). The relevant passage runs as follows:

> "In 1989 SCC (Cri) 486, the Supreme Court held that if the accused has crossed the maximum age of detention in an approved school, the only course to be followed is to sustain his conviction but quash the sentence and release him forthwith. In view of the above, we are of the view that though the conviction of the appellant is sustained, his sentence is quashed as was ordered by the Supreme Court. In the result, the appeal is disposed of in the above terms."

19. On a careful perusal of the above judgment submitted by the learned counsel for the appellant and the Madras Borstal Schools Act, we could see that the definition of Adolescent Offender was amended in the year 1989 by Madras Act No.15 of 1959 fixing the year as not less than 18 years or more than 21 years. The same was subsequently amended by Act 13/1989 to the effect that, in respect of boys it is not less than 16 years and in respect of girls not less than 18 years and not more than 21 years of age in either case. Therefore, we have to see whether the accused was within 16 years of age and not more than 21 years of age to be classified as 'Adolescent Offender' for the purpose of getting benefits under the Madras Borstal Schools Act as well as the aforesaid judgment of our High Court.

20. According to Ex.D1, the date of birth was 5.5.1980. The date of judgment of the trial Court is 28.8.2001. Therefore, the age of the accused as on the date of judgment is 21 years 3 months. Therefore, the accused cannot be termed as an 'adolescent offender' in order to attract the provisions of Madras Borstal Schools Act. Therefore, the judgments cited by the appellant's counsel are not applicable to the present case.

21. On over all discussion, we are of the considered view that the arguments advanced by the learned counsel for the appellant are not sustainable and the conviction and sentence of the lower Court passed against the accused to undergo imprisonment for life on both offences under Sections 376 and 302 I.P.C. and the fine imposed at Rs.5000/- per offence are sustainable and are not liable to be set aside.

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In the result, the appeal is dismissed holding the accused guilty of offences under Sections 376 and 302 I.P.C. and confirming the judgment of conviction and sentence made in S.C.No.164 of 2000 on the file of the III Additional District Sessions Judge, Dharmapuri.

kv

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The III Addl. District Sessions Judge,
   Dharmapuri District at Krishnagiri.

2. -do- Thro, The Principal Sessions Judge,
   Dharmapuri District at Krishnagiri.

3. The District Collector,
   Dharmapuri at Krishnagiri.

4. The Director General of Police,
   Chennai.

5. The Public Prosecutor,
   High Court, Madras.

6. The Superintendent,
   Central Prison, Vellore.

7. The Inspector of Police,
   Denkanikottai Police Station,
   Denkanikottai.

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